Supreme Court, U.S.
FILED
DEC 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-511

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

PATRICIA KWALLEK,
Petitioner,

vs.

ROGER ENDELL, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS, and HAROLD BROWN, ATTORNEY GENERAL OF THE STATE OF ALASKA
Respondents.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals err in concluding that any error in the admission of Kwallek's pre-arrest interview with the troopers was harmless beyond a reasonable doubt in light of the strong evidence of guilt and the fact that Kwallek's attempt to explain away this strong evidence was "patently contrived"?

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JURISDICTION

Kwallek has received a judgment from the Ninth Circuit Court of Appeals. This Court's jurisdiction is properly invoked under 28 U.S.C. §1254.

STATEMENT OF THE CASE

A. Introduction

Patricia Kwallek was convicted of first-degree murder in the superior court of the State of Alaska. After the state appellate courts affirmed her conviction, Kwallek petitioned for a writ of habeas corpus in the federal courts, claiming that her pre-arrest statement to the Alaska State Troopers should have been suppressed. The Ninth Circuit Court of Appeals held that the error (if error at all) was harmless beyond a reasonable doubt. Because Kwallek is seeking review of the Court of Appeals's harmless error determination, it is necessary to set forth the facts in some detail.

B. Factual Background

Bernard "Spade" Kwallek was shot five times in the chest, neck and head as he was leaving for work in Ketchikan, Alaska, on the morning of Thursday, June 24, 1982. One of the bullets entered his brain and was instantly fatal. Although there were no immediate suspects, suspicion later focused on the victim's wife, Patricia Kwallek. The following evening Patricia Kwallek was arrested on a charge of first-degree murder.

The Kwalleks lived in a two-bedroom home on Loop Road in Ketchikan, Alaska. Loop Road is a dirt road that stems off to the west from the North Tongass

Highway. The Kwallek residence is the first house on the right after one turns off the highway onto Loop Road. There is only one door to the residence. There is a wooden walkway leading from the door to the driveway, where Spade's pickup was parked. An oil tank sits on a wooden platform near the door to the residence.

One of Kwallek's neighbors, Lou Ann Cottle, was in bed studying on the morning of June 24, 1982. Sometime around 7:00 a.m. she heard three shots and a male voice shouting, "What are you doing, I haven't done anything." She heard a male voice say, "What's going on here," and then two more shots. Mrs. Cottle is not sure whether she heard one or two separate male voices. She did not hear anyone yelling "Patsy"; nor did she hear any female voices. Mrs. Cottle looked out the window, but she did not see or hear anything suspicious, such as a person running or a vehicle speeding away.

Deanna Cottle was also in bed on the morning of June 24th when she heard three shots being fired, then two more. Her bedroom window was closed and she did not hear any voices.

Another neighbor, Susan Novak, heard several shots while she was getting ready for work. Ms. Novak did not see or hear anything unusual other than the shots.

Harlan Heaton works in a building located across the North Tongass Highway from the Kwalleks. Mr. Heaton got to work at approximately 7:25 on the morning of June 24th. Shortly thereafter, he heard sirens; he did not hear any shots.

Gary Greg Boles lived on Loop Road and was working on his carport when he heard four shots. Twenty seconds later he heard two more shots. During this twenty-second interval, a man was screaming something to the effect of "Oh, my God" and "I didn't mean it." Mr. Boles heard only one male voice; he did not hear any female voices.

Loy Price was with Mr. Boles. Mr. Price heard three or four shots, one man screaming, and a couple more shots. He could not understand the words the man was screaming. Neither Mr. Boles nor Mr. Price saw or heard any people running away or vehicles speeding away. After hearing the second set of shots, Mr. Boles called the troopers.

Sylvia Andrew, the dispatcher for the troopers, received Mr. Boles's call at 7:28 a.m. A woman called in at 7:30. According to Ms. Andrew, had someone else also called to report the shooting while she was speaking to Mr. Boles, the call would have been transferred to one of the two remaining lines. The caller would not have gotten a busy signal.

When the emergency medical technicians arrived, Kwallek was on her haunches in the middle of Loop Road. Spade was lying near a small shed, flat on his back with his arms out. He was bleeding profusely.

Trooper Gorder was the first trooper to arrive at the Kwallek residence. The emergency medical technicians were attending to the victim; Kwallek, clad in an off-white robe, was leaning against the shed, watching. Trooper Gorder asked Kwallek what happened and she stated that she did not know. She explained that Spade had just left for work and she heard several "popping" sounds. When Spade screamed "Patsy" twice, she ran outside and found him lying by the shed. She did not see anyone in the area, nor did she hear any vehicles. She later repeated her story to Sgt. Rogers.

Sometime around 8:30 a.m. Kwallek signed a waiver of search form, giving her consent to a search of the residence. Shortly thereafter she dressed and went to the home of her friends, the Jencks.

The area surrounding the Kwallek residence was searched for a sniper. When no one was found, the troopers began searching for evidence. A .22 caliber shell casing with an "F" logo on it was found on the road. Three .22 caliber shell casings with "F" logos and a live bullet were found by the oil tank located near the only door to the Kwallek residence.

Numerous guns were found in a built-in gun cabinet in the Kwallek residence. The second bedroom was being used as a reloading and storage room. There the troopers found .22 caliber ammunition bearing an "F" logo.

Sgt. Lown searched the attic and found a .22 caliber semi-automatic rifle partially hidden under a box. He had gained access to the attic by pulling down a set of stairs from the ceiling of the reloading room. The rifle belonged to the Kwalleks and was usually kept in the gun cabinet near the door. There were two bullets in the rifle when it was seized. Subsequent testing established that the rifle was the murder weapon. The fingerprint lifts taken from the butt and forestock were not suitable for comparison purposes.

Sometime around 3 o'clock that afternoon, Sgt. Glass interviewed Kwallek at the Jenck residence. At that time he was not aware that the rifle had been found in Kwallek's attic. Kwallek's statement was similar to those she had given to Trooper Gorder and Sgt. Rogers, but it was more detailed. Kwallek explained that she had gotten up at about 6:30 that morning and fixed Spade his breakfast and lunch. She waved goodbye to him as he left for work sometime around 7:25. Then she heard popping noises and Spade screaming her name. She ran outside, found him lying by the shed and called the ambulance. The dogs were barking while she was on the phone. She also heard a "squeaky, creaky

bong" sound, which she could not identify. She had seen no one either inside or outside the house. She admitted that she and her husband had argued over finances and that he blamed her for failing to pay the rent for their boat stall on time.

On the following afternoon (June 25th), Sgt. Rogers picked up Kwallek at the Jenck residence and brought her to her home for an interview. She was interviewed in the kitchen by Sgt. Lown and Sgt. Glass. Eight minutes into the interview she was advised of her *Miranda* rights and executed a written waiver of those rights. Kwallek's version of the events of the morning of June 24th was substantially similar to the statement she gave to Sgt. Glass the previous afternoon, except that she claimed she had to dial twice for the ambulance. Kwallek also admitted that she had been in the attic recently and that she was behind on a lot of the bills, including the 1980 taxes. She kept many of these financial problems from her husband. She felt that when she finally told him about the money problems one of two things would happen -- Spade would get everything straightened out or they would go their separate ways. The attic door was opened twice during this interview, but Kwallek did not react.

Approximately 20 minutes into the interview, three other troopers entered the Kwallek residence to execute search warrants. These warrants authorized seizure of financial records, a sample of insulation from

the attic, and the off-white robe Kwallek was wearing when her husband was shot. Copies of the warrants were given to Kwallek, and Sgt. Lown told her what they were looking for. Sgt. Lown then explained that she had been formally served with copies of the warrants and that the other troopers would conduct the search. He then posed the following question, "Do you have any questions about that?" Kwallek responded, "No. I think I should wait and talk with my mom [when she] gets here before I say what to do."

Sgts. Lown and Glass said nothing further about the search warrants, and switched the topic of conversation back to the events of the previous morning. They also questioned Kwallek about the unpaid bills. Kwallek explained that the bills had not been paid because there was no money to pay them. When asked where the money had gone, Kwallek told the troopers that she wanted to wait till her mother arrived because her mother could help. Kwallek's mother was due to arrive shortly, and Kwallek agreed to talk then. Sgt. Glass, after informing Kwallek that the other troopers would begin the search, asked her where the bank records and checkbook were kept, apparently to aid the troopers in locating the items listed on the warrant. Kwallek stated that her husband did not have a checking account and that she did not keep any books regarding household expenditures. When asked why she did not keep any records, Kwallek reiterated that she wanted to wait until

her mother got there. The interview was formally terminated at that time.

Kwallek agreed to accompany the troopers to the station and wait for her mother there. While Kwallek awaited the arrival of her mother, some of the investigating troopers and the district attorney met to discuss the case. At that time the decision was made to arrest Kwallek. Kwallek made no further statements to the troopers after she was placed under arrest.

The Kwallek residence was searched pursuant to the warrants. Various paperwork relating to the Kwalleks' financial condition (*e.g.*, invoices, bills, dunning letters, cancelled checks) were found wrapped in a yellow pillowcase in a dresser drawer. Kwallek's off-white robe was found underneath a pile of clean clothes lying on the bed. A search of Kwallek's purse revealed checks, a check, book, income tax forms, utility bills, savings statements, credit union statements, bills, invoices and past-due notices.

Kwallek's robe was sent to a crime lab for analysis. Lead residue was found on the sleeves and front surface of the garment. Substantial amounts of residue were found on the right sleeve. The pattern of residue found on the right sleeve was consistent with that which would be found if one were pulling the trigger of the murder weapon with the left hand.

Kwallek, who is left handed, was familiar with weapons.

According to the state's expert, it was unlikely that a person would pick up such lead residue by walking around in a reloading room because lead in a reloading room would be in a solid state. The residue found on the robe was gaseous residue which is generated when a weapon is fired. Moreover, if weapons had been fired in the reloading room and if Kwallek had then rubbed her sleeve in any residue which fell on a tabletop, there would be an obvious wipe mark, which was not found on Kwallek's robe.

At trial, the state hypothesized that Spade found out about the couple's financial problems, that the Kwalleks argued, and that when he left for work on June 24th, Spade either told Kwallek he was leaving her or that she had better be gone when he got home. In support of this theory the state presented evidence that the Kwalleks were substantially behind in their bills. In addition to the financial documents seized during searches of Kwallek's home and purse, there was testimony from several persons who had loaned Kwallek over $11,500.00. Although Kwallek tried desperately to hide their financial trouble from Spade, he had discovered the existence of two outstanding bills just prior to his death.

At trial, Kwallek proposed a "mysterious gunman" theory. Kwallek argued that someone had stolen the rifle from the Kwalleks' house, used it to kill

Spade, then hid it in Kwallek's attic. Kwallek had no idea who this mysterious gunman might be, or what his motive might be.

Kwallek's trial testimony relating to the early morning hours of June 24, 1982, was generally consistent with her earlier statements. She also suggested that the "squeaky, creaky bong" sound she had heard while she was calling for an ambulance was the sound of the attic stairs being pulled down.

Steven Neitzke also testified on Kwallek's behalf. Mr. Neitzke lived across the North Tongass Highway uphill from Mr. Heaton's shop. On June 24, 1982, Mr. Neitzke was awakened from a deep sleep by a woman screaming, two dogs barking, and two men shouting.

C. State Court Proceedings

Kwallek was indicted for murder in the first degree. Prior to trial, she moved to suppress her June 25th statement to Sgt. Lown and Sgt. Glass on the ground that it had been taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). After an evidentiary hearing, the trial judge denied the motion, finding that Kwallek was not in custody during the interview. A jury subsequently found Kwallek guilty as charged.

Kwallek appealed her conviction to the Alaska court of appeals, raising numerous issues. That court affirmed in a per curiam unpublished opinion. *Kwallek v. State*, Alaska App. Memorandum Opinion No. 883 (July 24, 1985) [App. 53-92] With respect to the *Miranda* issue, the court concluded that Kwallek was not in custody at the beginning of the interview. The court assumed, without deciding, that the interview had escalated into a custodial interrogation at the time Kwallek was advised of her *Miranda* rights. Proceeding on this assumption, the court of appeals held that Kwallek's initial statement about wanting to talk to her mother was made in direct response to a question about the search warrants and, therefore, did not amount to an unequivocal assertion of the right to remain silent with respect to further questioning on other subjects. Kwallek's second statement about talking to her mother did, however, constitute an unequivocal assertion of the right to remain silent, requiring the cessation of all questioning. Applying the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), the court concluded that Kwallek had not been prejudiced by the admission of the few statements she made after this point. [App. 70-80]

Judge Singleton, in a concurring opinion, disagreed about the custody issue. He would have affirmed the superior court's finding that Kwallek was not in custody during the interview. Since Kwallek was not in custody, *Miranda* did not apply, and the troopers were

not required to scrupulously honor any invocation of the right to remain silent. [App. 85-86]

Judge Bryner dissented. He would have ruled that Kwallek's first statement about talking to her mother constituted an unequivocal assertion of the right to remain silent, and that the failure to suppress the remainder of the interview was not harmless. [App. 88-92]

On appeal, Kwallek argued for the first time that the admission of a transcript of the June 25th interview containing the statements about wanting to talk to her mother, as well as Sgt. Lown's trial testimony that the interview terminated when Kwallek said that she wanted to talk to her mother before finishing the interview, constituted impermissible comments on her right to remain silent in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). Because this issue had not been preserved in the trial court, the court of appeals applied the plain error standard of review under Rule 47(b) of the Alaska Rules of Criminal Procedure. It held that even if there were error, the error was not "obviously prejudicial". Given this holding, it was not necessary to reach the merits of the *Doyle* issue. [App. 80-82]

Kwallek petitioned the Alaska supreme court for discretionary review. After that court denied review, [App. 94] Kwallek petitioned this Court for certiorari.

That request was also denied. *Kwallek v. Alaska*, 475 U.S. 1108 (1986).

D. Federal Court Proceedings

Kwallek then filed a petition for writ of habeas corpus in the federal district court. The district court judge granted the petition, finding: (1) the state trial court finding that Kwallek was not in custody was not fairly supported by the record; (2) Kwallek's first statement about wanting to talk to her mother was ambiguous, and the troopers' failure to seek clarification required suppression of the rest of the interview; (3) the *Doyle* issue was adequately preserved in state court; and (4) the *Miranda* and *Doyle* errors were not harmless beyond a reasonable doubt. [App. 9-17]

The State of Alaska appealed to the Ninth Circuit. With respect to the *Miranda* issue, the State argued that the record fairly supported the state trial court's factual finding that Kwallek was not in custody, so the troopers were not required to scrupulously honor any assertion of the right to remain silent. Alternatively, the State argued that the presumption of correctness accorded state court findings under 28 U.S.C. §2254(d) applied to the Alaska appellate court finding that Kwallek's first statement about talking to her mother was limited to a discussion of the execution of the search warrants. Since this was a limited invocation of the right

to remain silent, the troopers did not violate *Miranda* when they questioned Kwallek about other topics.

With respect to the *Doyle* issue, the State argued that the federal courts should not consider the claim because Kwallek had not demonstrated cause and prejudice for her procedural default in state court. In making this argument, the State contended that the federal courts were bound by the state appellate court determination that Kwallek had not adequately preserved the *Doyle* issue under state law.

The Ninth Circuit Court of Appeals reversed the district court in an unpublished opinion. *Kwallek v. Endell*, Memorandum Opinion (May 18, 1989) [App. 1-8] The court did not decide the substantive issues raised in the State's brief, concluding that any error in the admission of Kwallek's June 25th statement and Sgt. Lown's testimony was harmless beyond a reasonable doubt. This conclusion was based on the strong evidence of guilt and the fact that Kwallek's "mysterious gunman" defense was implausible. The court wrote:

> The rifle which killed [Spade] Kwallek was found in the attic of the Kwalleks' home shortly after the shooting. Spent shells from the same rifle were found near the door of the residence, some distance from the site of the shooting. A state expert testified that the pattern of gaseous residue on

> Kwallek's robe was consistent with her having fired the murder weapon with the left hand. Kwallek, who is left-handed, is familiar with weapons. The state also presented substantial evidence of motive, including testimony to the effect that the Kwalleks' financial difficulties were a source of considerable marital friction.
>
> Finally, Kwallek's attempt to explain away this mass of circumstantial evidence was patently contrived. There is no plausible reason why the gunman, having shot her husband outside the house with one of the Kwalleks' rifles, would gather up the spent shells and leave them near the door, then go into the house, pull down the attic stairs and hide the weapon in the attic before fleeing without a trace. Similarly unconvincing was Kwallek's contention that the gunshot residue on her house robe was picked up off a table top, as there were no wipe marks on the robe.
>
> In short, the admission of the June 25 transcript was, if error at all, harmless.

[App. 3-4] Judge Reinhart dissented, disagreeing with the majority's conclusion that any error was harmless. [App. 5-8]

Kwallek now asks this Court to review the harmless error determination made by the Ninth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF HARMLESS ERROR IS FACT-BOUND; IT DOES NOT WARRANT DISCRETIONARY REVIEW BY THIS COURT

Kwallek argues that the Ninth Circuit Court of Appeals was wrong when it decided that any error in the admission of the transcript of the June 25th interview and Sgt. Lown's testimony that the interview terminated when Kwallek said she did not want to talk anymore until her mother arrived was harmless beyond a reasonable doubt. (Pet. at pages 18-23) This is nothing more than a request for this Court to re-weigh the strength of the evidence.

Contrary to Kwallek's assertion regarding motive, the State's evidence showing marital strife as a result of financial problems was strong. The State introduced evidence seized during searches of Kwallek's home and purse, which demonstrated that the Kwalleks were behind in paying their bills. Richard Stack also testified that he loaned Kwallek $10,000 in 1979; he did not tell Kwallek's husband about the loan because Kwallek had asked him not to. Approximately two months before the murder, Kwallek gave Stack a deposit slip for $10,000 and told him that she had deposited the money into his bank account. This was a lie; the deposit slip was actually for the business account of a friend of Kwallek.

Approximately two weeks before the murder, Mrs. Jenck loaned Kwallek $419 to pay her overdue utility bill and had not been paid back. Kwallek owed Mary Ann White over $600 for a bounced check and for one of Kwallek's utility bills which White had paid for Kwallek. Kwallek also owed a former employer $500 since November 1981.

Although Kwallek tried desperately to hide these financial troubles from Spade, he was beginning to find out about them. Mr. Enright's construction company did some work for Spade in 1982. Shortly before Spade's death, Mr. Enright asked Spade when Spade was going to pay the $2000 bill. Spade said he thought it had been paid and that he would talk to Kwallek about it. The Saturday before Spade's death, Spade discovered that his boat had been removed from his stall because the rent had not been paid. This news upset Spade.

The State also presented evidence that Spade did not believe in credit and was proud of the fact that he paid his bills on time. Although Spade was only 47, he had planned to retire soon, bragging that he had saved nearly $60,000. That money was not found.

Even if the evidence of motive was not as strong as in other cases, this does not undercut the Ninth Circuit's harmless error finding. Motive is not an element of first-degree murder under Alaska law. All the State was required to prove was that Kwallek intention-

ally caused Spade's death. The physical evidence that Kwallek was the killer was extremely strong: the murder weapon belonged to the Kwalleks; the weapon was found in the attic of the Kwallek residence shortly after the shooting; the sleeve of the robe Kwallek was wearing on the morning of the murder had a pattern of gunshot residue which was consistent with Kwallek having fired the murder weapon. The fact that the test for nitrites on the robe was negative was not surprising due to the fact that nitrites are easily oxidized by things in the air and on clothing, thereby making later detection impossible.

This fact-bound issue of harmless error does not warrant the exercise of this Court's discretionary review. The Ninth Circuit, in deciding that the error was harmless, did not decide new law; it simply applied the test set forth by this Court in *Chapman v. California*, 386 U.S. 18 (1967), to the facts of Kwallek's case.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

Kwallek's argument that the Ninth Circuit's decision in her case conflicts with this Court's decisions in *Chapman v. California*, 386 U.S. 18 (1966) and *Fontaine v. California*, 390 U.S. 593 (1968), should be rejected. The fact that this Court found that the prosecutor's comments on the defendants' refusal to take the stand in those cases was not harmless error does not mean that there is no factual scenario in which such an error would be harmless. In fact, this Court in *Chapman* specifically declined to adopt a rule of automatic reversal. 386 U.S. at 22.

Kwallek's discussion focuses entirely on the strength of the evidence of guilt in *Chapman*. Noticeably absent from this discussion are references to a major difference in the two cases: the prosecutor's closing arguments. The appendix to this Court's decision in *Chapman* contains 17 pages of excerpts from the prosecutor's closing argument in which the prosecutor repeatedly referred to the fact that the defendants did not testify on their own behalf. The prosecutor also repeatedly asked the jury to draw adverse inferences from their failure to testify.

Kwallek's case is factually different. Kwallek voluntarily agreed to talk to Sgt. Lown and Sgt. Glass on

June 25th. She did not remain silent. Kwallek also testified at trial. She was not asked during cross-examination why she terminated the interview. The prosecutor, in closing argument, did not refer to Kwallek's desire to talk to her mother before proceeding with the June 25th interview, nor did she ask the jury to draw any adverse inference from Kwallek's statements about wanting to talk to her mother.

Moreover, the reference to Kwallek's decision to stop talking was brief. Sgt. Lown's statement that "Patsy didn't want to talk anymore" was one line in approximately 800 pages of transcribed testimony of 55 witnesses. It simply explained why the interview ended when it did. The 18-page transcript of the interview was one of 94 trial exhibits; the three statements about wanting to talk to her mother appear on pages, 14, 16 and 17.

In the context of Kwallek's case, even if it was error to admit admission of Sgt. Lown's isolated statement that the interview terminated because Kwallek didn't want to talk anymore, the error was harmless. *See e.g. Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir. 1988) (error harmless where references to the defendant's silence were brief and played a minor role in the government's presentation of its case); *United States v. Harrold*, 796 F.2d 1275, 1281 (10th Cir. 1986) *cert. denied*, 479 U.S. 1037 (1987) (harmless error where reference to the defendant's silence was an isolated

remark in a two-week trial); *Hobbs v. Lockhart*, 791 F.2d 125, 130 (8th Cir. 1986) (error harmless where there was no repetitive questioning regarding the defendant's silence and the prosecutor did not attempt to highlight the evidence in argument); *United States v. Shaw*, 701 F.2d 367, 383 (5th Cir. 1983) *cert. denied*, 465 U.S. 1067 (1984) (error harmless where the prosecution did not highlight the evidence of defendant's silence or refer to it in closing argument).

III. THERE IS NO NEED TO CLARIFY THE LAW

Kwallek urges this Court to grant certiorari to decide the issue left open in *Greer v. Miller*, 483 U.S. 756 (1987): whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, the standard should be whether the error substantially affected the course of the trial rather than whether the error was harmless beyond a reasonable doubt. This case is not an appropriate case to decide that issue for two reasons.

First, the issue is not really presented in this case. As discussed in the statement of the case, Kwallek did not raise the *Doyle* issue in the trial court. The Alaska court of appeals, applying the "plain error" standard of review, concluded that the reference to Kwallek's statements about wanting to talk to her mother was not "obviously prejudicial". Since Kwallek did not properly preserve the *Doyle* issue in the state trial court, the Ninth Circuit should have required her to demonstrate cause and prejudice for her procedural default. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). At the very least, the Ninth Circuit should have applied the "plain error" standard of review. *Cf. United States v. Young*, 470 U.S. 1, 15 (1985) (plain error standard of review applies on appeal when defendant failed to comply with contemporaneous objection rule).

Instead, the Ninth Circuit applied the strictest standard of harmless error review -- "harmless beyond a reasonable doubt" -- and still affirmed Kwallek's conviction. Because the Ninth Circuit used the test most favorable to Kwallek, the conclusion of harmless error will be the same even if this court holds that the test is whether the error "substantially affected" the course of the trial, or that Kwallek was required to demonstrate cause and prejudice for her procedural default. Thus, this legal issue is moot in Kwallek's case.

CONCLUSION

Kwallek's petition for writ of certiorari should be denied.

Respectfully submitted this 15th day of December, 1989.

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